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Jonathan Miller
Secretary

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No. 10-33

James E. Parsons
Taft, Stettinius & Hollister LLP
1717 Dixie Highway, Suite 910
Covington, KY 41011

RE: Determination of Protest: PR-7115, Kenton County, Invitation to Lease Office Space

Dear Mr. Parsons:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Wiedemann Square, Ltd ("Wiedemann Square") relating to PR-7115 (the "Invitation") for office space in Kenton County, Kentucky.

FACTUAL BACKGROUND

The Finance and Administration Cabinet, Department for Facilities Management, at the request of, and on behalf of The Education and Workforce Development Cabinet ("EWDC") issued the Invitation on October 26, 2010, pursuant to KRS 56.803. The Invitation sought proposals for approximately 31,059 square feet of office space with 168 reserved parking spaces located in Covington, Ky., within the following boundaries: Ohio River (North), 26th Street (South), I-75 (West), and the Licking River (East). Proposals were due by 10:30 a.m. on Monday, November 29, 2010.

On November 1, 2010, counsel for Wiedemann Square filed a written protest. Wiedemann Square has property available for lease at Sixth and York, Streets, Newport, Campbell County, Kentucky. Wiedemann Square wishes to offer its property for consideration in response to the Invitation and contends that the geographical limitation is arbitrary and capricious. On December 10, 2010, EWDC filed a response to the protest.

For the reasons stated herein, this protest is DENIED.

DETERMINATION

After a review of the record consisting of (1) the protest, (2) the protest response, (3) the Invitation, and (4) the applicable statutes and regulations, the Secretary of the Finance Cabinet ("Secretary") finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary of the Finance Cabinet. KRS 45A.285. Wiedemann Square states in its protest that it desires to propose to the Invitation. Wiedemann Square, therefore, has standing to protest the terms of the Invitation.

A protest must be filed promptly and, in any event, within fourteen (14) calendar days after the aggrieved person knows or should have known of the facts giving rise thereto. KRS 45A.285(2). In this case, the Invitation was issued on October 26, 2010. The protest was filed on November 1, 2010. The protest, therefore, was filed in a timely manner.

The protestor has the burden to show that the agency's actions were either without a reasonable basis or in violation of applicable procurement law. See *GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 779 (Fed.Cl. 1997). The protestor must clearly establish that the terms of solicitation evaluation are irrational. This is not accomplished by the protestor's mere disagreement with the agency's judgment. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). The Secretary will not "substitute [his] judgment ... for that of the agency, but [will] intervene only when it is clearly determined that the agency's determinations were irrational or unreasonable." *Baird Corp. v. United States*, 1 Cl.Ct. 662, 664 (1983). If the agency shows that there was a reasoned basis for its decision, the solicitation must be upheld. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998).

In its letter of protest, Wiedemann Square contends that it

. . . has property available for lease at Sixth and York Streets, Newport, Campbell County, Kentucky, that meets all of the requirements of the Invitation, except that the property is not located in Covington, Kentucky. As we argued in our letter of July 7, 2010, the requirement that the property to be leased pursuant to the Invitation be located in Covington, Kentucky, is arbitrary and capricious and without justification. The Invitation is for the One-Stop Operation in Northern Kentucky, which serves residents of the entire urban area of Northern Kentucky — not just residents of Kenton County. The location of my client's property is less than one-half mile from the Kenton County line, located on a major highway, and is readily accessible to residents of the entire region. The location mandate in the Invitation is not supported by the agencies involved with the One-Stop and is arbitrary.

In response, EWDC states:

. . . the protest erroneously asserts that "the requirement that the property to be leased pursuant to the Invitation be located in Covington, Kentucky, is arbitrary and capricious and without justification." From a historical perspective, the Employment Services and Unemployment Insurance Programs have been housed in the Covington State Office Building since 1956. There has been a NK One-Stop office in Covington, Kentucky since October 31, 2001. The NK One-Stop is seeking other office space in Covington for a comprehensive One-Stop that integrates all of its partners under one roof. This will provide conveniently located employment and training services for employers and NK One-Stop clients.

Contrary to the protest assertion, attached is a memorandum dated September 2, 2010,

outlining the factors justifying the location in Covington, Kentucky. An additional consideration is the preparation by the Gateway Community and Technical College for a new urban campus in Covington, Kentucky. Furthermore, the geographic boundaries outlined in the Invitation includes almost all of downtown Covington and such will allow for competition for the lease project.

The protest also erroneously asserts that "[t]he location mandate in the Invitation is not supported by the agencies involved with the One-Stop and is arbitrary." The EWDC's Office of Employment and Training (OET), Office of Vocational Rehabilitation (OVR), and the Office for the Blind (OFB) are Federally required One-Stop partners. 29 U.S.C.A. § 2841(b). As set forth in the attached memorandum, the EWDC and the Northern Kentucky Workforce Investment Board (NKWIB) are in agreement that Covington, Kentucky provides the appropriate urban core for the NK One-Stop and protects the substantial interests of the Commonwealth of Kentucky. An attached email from NKWIB's Barbara B. Stewart states: "The review of the community data indicated more numbers in need in Covington. The NKWIB understands that the location of the One-Stop in Covington will operate to provide the greater good for the greater number..."

The Secretary finds that EWDC's response demonstrates various relevant and appropriate considerations that constitute a reasoned basis for the terms of the Invitation and that Wiedemann Square has failed to establish that the terms of the Invitation were arbitrary, capricious, or contrary to law. The presumption of correctness in KRS 45A.280 applies and Wiedemann Square has failed to provide sufficient evidence to overcome this presumption. Since there is no basis to overturn this procurement, the protest must be **DENIED**. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by the Secretary shall be final and conclusive.

For the Secretary
Finance and Administration Cabinet
By Designation



Robin Kinney
Executive Director
Office of Administrative Services

cc: Randall K. Justice, General Counsel, EWDC
Brien Hoover, Finance Facilities